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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-_____

MILDA R. SANDSTROM,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

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2. Whether the Fifth Amendment privilege against compulsory self-incriminal prohibits the forced production by defendant of statements and narrative reports of possible witnesses when such order for production extends to statements and reports of witnesses not yet called at trial and requires production of all such statements prior to commencement of the defendant's evidence.

3. Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit the State of Kansas from retaining the standard for criminal responsibility commonly referred to as the "M'Naghten" rule in view of the nearly universal adoption of Federal Courts including the Tenth (10th) Circuit of the different and better based standard known as the ALI test.

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Respondent, State of Kansas, respectfully prays that the Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas be denied.

JURISDICTION

The judgment of the Kansas Supreme Court was entered on May 5, 1979. A motion for rehearing was timely filed but denied on June 13, 1979. The Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the Sixth and Fourteenth Amendments to the Constitution of the United States, granting the right to be personally present at all stages of a criminal proceeding, can be forfeited by claim of counsel that he had "carte blanche" authority to waive the defendant's presence, thereby denying the right to attend the ruling on motion for judgment of acquittal and an *in camera* hearing into juror misconduct resulting in the subsequent disqualification and replacement of the juror in absence of defendant.

2. Whether the Fifth Amendment privilege against compulsory self-incriminal prohibits the forced production by defendant of statements and narrative reports of possible witnesses when such order for production extends to statements and reports of witnesses not yet called at trial and requires production of all such statements prior to commencement of the defendant's evidence.

3. Whether the Due Process and Equal Protection clauses of the Fourteenth Amendment prohibit the State of Kansas from retaining the standard for criminal responsibility commonly referred to as the "M'Naghten" rule in view of the nearly universal adoption of Federal Courts including the Tenth (10th)

Circuit of the different and better based standard known as the ALI test.

STATUTORY PROVISIONS INVOLVED

We do not disagree with those provisions as stated by the Petitioner.

STATEMENT OF THE CASE

This action arose as a result of the May 3, 1977 shooting of Thad M. Sandstrom, the husband of the Petitioner in Topeka, Kansas. The evidence showed that the parties were in the process of getting a divorce and while the Petitioner was visiting friends in Oklahoma she returned to Topeka in the early morning hours of May 3, 1977, entered the house and shot her sleeping husband in the back of the head twice while he lay asleep in bed.

She immediately called a mutual friend and told him to come over to the house as "Thad needs you." She then climbed into bed with the deceased and when the friend arrived at the house it appeared to him that both the Petitioner and her husband were deceased. Later investigation revealed that she was alive and she was taken to the hospital emergency room. Petitioner was subsequently the following day charged with Murder in the First Degree. At trial, the only defense offered by the defendant was one of insanity. She was found guilty as charged and sentenced to life imprisonment. Prior to trial the Petitioner's attorney filed a Notice of Intent to Rely Upon the Defense of Insanity and requested a pretrial determination as to the applicable test to be applied as it related to the Petitioner's criminal responsibility, requesting that

the American Law Institute (ALI) test be substituted for the prevailing test in the State of Kansas, commonly referred to as the "M'Naghten" rule. The trial court following a long line of Kansas Supreme Court decisions ruled that the M'Naghten rule should be retained and the jury was instructed under that test.

At the close of the State's case in chief, the special prosecutor moved the trial court for an order requiring the Petitioner to turn over certain documents as they related to certain witnesses which were to be called to testify on behalf of the Petitioner. The Court ordered that done over the Petitioner's objection.

During the period of time shortly after the presentation of the State's evidence and prior to the commencement of the defendant's case, court,counsel and the court reporter retired to the court's chambers at which time the Petitioner's attorney presented a Motion for Judgment of Acquittal. The Petitioner was not personally present at that time, however, upon inquiry her attorney indicated that she waived her right to be present at that time. The court then overruled the Petitioner's Motion for Judgment of Acquittal at the start of court the following week. Also at the same time there was a short hearing wherein evidence was taken which indicated one of the jurors had engaged in misconduct which indicated great prejudice against the Petitioner. At that hearing her counsel again waived her right to be present as indicated by the record and without objection by the defendant the juror was discharged and was replaced by one of the alternate jurors and the case continued. The record does not show any objection or any Motion for Mistrial and the testimony as it related to the juror misconduct indicated that the misconduct was misconduct towards the Petitioner and indicated a predisposition to find the Petitioner guilty.

REASONS FOR NOT GRANTING THE WRIT

(A) The Decision Below Finding the Petitioner's Right to be Present at a Hearing to Determine Misconduct of a Juror Was Waived Does Not Conflict With Applicable Decisions of This Court and the Weight of Authority and Does Not Present a Question Not Heretofore Determined by This Court and Does Not Constitute a Departure From Rights Granted Under the Sixth and Fourteenth Amendments to the United States Constitution.

The Respondent certainly does concede that a criminal defendant has the right to be present at all times during the trial of a criminal case and is one of the fundamental rights to which a criminal defendant is entitled. However, the case authority is generally that this only applies to matters where the jury itself is present and does not attach where strictly matters of law are being considered absent a State statute to the contrary.

The statute in question K.S.A. 22-3405 states as follows:

> "Presence of Defendant. (1) The defendant in a felony case shall be present at the arraignment, every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by law. In prosecutions for crimes not punishable by death, the defendant's voluntary absence after the trial has been commenced and his presence shall not prevent continuing the trial to and including the return of the verdict. . ."

In deciding this case, the Kansas Supreme Court recognized defendant's constitutional and statutory rights to be present at her trial but found that it does not encompass proceedings before the Court which only involve matters of law. They went on to find that those rights are violated only if a defendant is absent when a jury is hearing a case or where he is prevented from attending other proceedings where his presence would be essential to a fair and just determination of a substantial issue. They then construed K.S.A. 22-3405 to mean that the defendant must be present at all times when the jury is present in the courtroom. The respondent feels that this is a fair and just interpretation of the defendant's right to be present during his trial. In this instance the court found that the petitioner at all times was on bond and was not physically restrained in any way from being present at any of the proceedings. It was her own choice and had been her choice in several other hearings preceding the trial to voluntarily absent herself and she did choose not to be present at all times as she was attending upon the court but did not choose to enter the court's chambers when these matters were being taken up by the trial court. The Kansas Supreme Court found in its opinion that the record showed that there was nothing which prevented the Petitioner from being present and that she could have been present at any time she desired to do so and that there had been a waiver at all times in every proceeding she had not appeared by her counsel. The record also shows that at no time during the selection process or any proceedings in front of the jury was the Petitioner absent.

In a rather extensive annotation entitled *Accused's Presence at Trial*, 25 L.Ed.2d 931, Section 6 at Page 939 it was indicated that the Supreme Court of the United States has held previously that where an

accused fails to make a timely objection for the trial court's denial of the opportunity to be present, such failure constitutes a waiver of the accused rights to subsequently contend that his federal constitutional right to be present has been violated. *Frank v. Magnum*, 237 U.S. 309, 59 L.Ed. 969 35 S.Ct. 582 (1915); *Gaines v. Washington*, 277 U.S. 8172 L.Ed. 793 48 S.Ct. 468 and *Johnson v. United States*, 318 U.S. 187, 87 L.Ed. 704, 63 S.Ct. 549, rehearing denied 318 U.S. 801, 87 L.Ed. 1164, 63 S.Ct. 826. In those cases as here, the defendant raised no objection to being absent and now wishes to take advantage subsequently of an opportunity which was never denied initially.

Basically, the arguments of the Petitioner should fail for two reasons. Firstly, there was never any objection on behalf of the Petitioner or her counsel raised in a timely fashion which indicated there had been a request to be present or that presence was denied. Secondly, there is absolutely no showing of prejudice whatsoever to this Petitioner. In fact, the removal of the juror was certainly an advantage to the Petitioner as the evidence indicated the removed juror had predetermined notions towards finding the Petitioner guilty. Again, there was no objection made as to the removal of the juror and there has been no showing of prejudice whatsoever on either of these two occasions when the Petitioner was not present.

(B) The Decision Below Does Not Misinterpret This Court's Holding in *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) Nor Does It Extend the Decision Beyond Its Intended Scope.

On this point the Petitioner completely misconstrues the Kansas Supreme Court decision as it

relates to *United States v. Nobles*, 422 U.S. 225, 95 S.Ct. 2160 45 L.Ed.2d 145. The Supreme Court of Kansas did not extend or expand Nobles in any manner or fashion. In fact the Supreme Court found that the trial court erred in requiring the statements be produced. The Supreme Court concluded that Nobles was distinguishable from the case herein and that there was no statutory authority for the trial court to compel defense counsel to furnish the statements. The Court then went on and concluded that the error of the trial court in furnishing the statements was not prejudicial under the circumstances of this case for the reason that the only issue in the case was the defendant's sanity at the time of the killing.

The furnished statements were not used in any manner to impeach or discredit any witness called by either party in this case and there was nothing to indicate that any of these statements furnished information which enabled the Respondent to obtain any evidence to establish the guilt of the Petitioner. The Court then went on to hold that the action of the trial court was erroneous, however, under the circumstances there was no prejudice shown to the Petitioner in obtaining a fair trial and they declined to reverse on that point.

Here again the Supreme Court of the State of Kansas found conclusively from the record that no prejudice came to the Petitioner as a result of the trial court's ruling and therefore, no substantial issue on this point is presented under the Fifth and Fourteenth Amendments. At Page 17 of the Petitioner's Petition is found the following language:

> "Thus, Petitioner was forced into the position of possibly supplying the link from which the jury determined conviction was necessary."

There is nothing in the record to indicate any truth whatsoever in that statement and the Supreme Court of the State of Kansas so found.

(C) In View of the Subtle Differences Among the Various State Jurisdictions a Universal Standard For Criminal Responsibility is Not Constitutionally Required in Order to be Compatible With the Due Process and Equal Protection Clauses of the United States Constitution.

On this point the Petitioner is asking the Supreme Court of the United States to take a universalistic stance and direct that the several states of this union have imposed upon it one set test to determine criminal responsibility in a criminal trial. The Petitioner, in essence, is requesting this court to impose a single standard upon the fifty states under the guise of due process and equal protection.

The real test should actually be whether or not the so-called "M'Naghten" rule falls so far below minimal Constitutional standards that a criminal accused is denied due process and equal protection under the United States Constitution.

At the last recounting, most of the federal jurisdictions with the exception of the First Circuit has used or adopted the ALI standard. The M'Naghten rule was the rule used in eighteen (18) states; five (5) states had adopted a combined M'Naghten-Irresistible Impulse rule; the so-called Durham rule was applied in the State of New Hampshire and the ALI standard had been adopted in some form or another in twenty-six (26) states.

It becomes clearly obvious from a review of the various jurisdictions that there is wide latitude and

differences in the tests of criminal responsibility among the various fifty states although they generally fall into the classification of M'Naghten and/or ALI, each with their own variations.

This court has on several occasions had this issue presented to it from several states and has uniformly declined to accept a review of this issue by denying certiorari. See *People v. J.C. Lewis, Jr.*, 31 Mich. App. 91, 187 N.W.2d 571, 1971 AFF,D 386 Mich. 407, 192 N.W.2d 215 1971 cert. denied 408 U.S. 929, 330 L.Ed.2d 342, 92 S.Ct. 2505 (1972); *State v. Paulsen*, 14 Utah 2d 213, 381 P.2d 93, cert. denied 375 U.S. 898, 11 L.Ed.2d 126, 84 S.Ct. 177; *William v. State*, 85 Nev. 169 451 P.2d 848 cert. denied 396 U.S. 916 (1969).

The basic problem with any insanity test evolves from the inability of the legal and medical professions to develop a mutual insanity standard. The legal profession functions from an objective rhetorical base which seeks definitions and applies those definitions to the facts. It seeks the accountability of individual action, the protection of society and the deterrence of crime. Conversely the medical profession, particularly the psychiatric branch, functions from a subjective personality base which seeks behavioral nuances and analyzes those nuances by individual expertise. It seeks the discovery of mental illness, the rehabilitation of the patient and the abolition of punishment. The goal and the test of criminal responsibility is to have a test which offers a fair balance between competing considerations for the protection of society and the defendant as well as the rehabilitation and restoration of the defendant. There is no empirical evidence to show that the M'Naghten rule does not meet this test any less than does the ALI test.

The Petitioner indicates that in light of recent scientific developments that the M'Naghten rule no longer meets Constitution standards. Respondent respectfully submits that there is nothing scientific in regard to either the ALI nor the M'Naghten test and they are merely societal judgments as to which best fits the particular society in a reconcilation of competing interests.

CONCLUSION

For the reasons stated, we believe there are no issues raised here having sufficient legal merit to justify this Court's review and request that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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